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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DAVID A. CORDIER,

Plaintiff and Appellant,

v.

SWANSON REALTY GROUP, INC.,

Defendant and Respondent.

B214960

(Los Angeles County
Super. Ct. No. ED039622)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura A. Matz, Judge. Affirmed.

David A. Cordier, in pro. per., for Plaintiff and Appellant.

Law Offices of John A. Tkach and John A. Tkach for Defendant and Respondent.

David A. Cordier appeals from the judgment of dismissal entered in favor of Swanson Realty Group, Inc. (SRG) to the extent it awards costs to SRG and from the postjudgment order granting SRG's motion to tax costs and denying Cordier's motion to tax costs. Cordier contends the trial court erred in failing to find he was the prevailing party for the purpose of an award of costs under Code of Civil Procedure section 1032.¹ We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Cordier filed an action on September 21, 2004 against John A. Tkach and three other defendants, including SRG, to set aside or annul several allegedly fraudulent conveyances. Cordier alleged Tkach owed him more than \$139,000 in legal fees for services Cordier (a lawyer) had provided to Tkach and others. Cordier further alleged he had obtained a judgment from the Los Angeles Superior Court on September 1, 2004 based on that claim (case No. EC033305). (The judgment with prejudgment interest and costs was slightly more than \$195,000.) The fifth cause of action, the only claim naming SRG as a defendant, sought to set aside the transfer by Tkach to SRG of a security interest (a deed of trust with assignment of rents) in a condominium located in Pasadena, valued at \$250,000, to the extent necessary to satisfy Cordier's claim or judgment.

Proceedings on Cordier's action were apparently stayed pending appeal of Cordier's judgment. In a nonpublished opinion filed August 22, 2006, we affirmed the judgment in part (the judgment against Tkach, also a lawyer and his law firm, then known as McMillan & Tkach) and reversed it in part (the portion of the judgment against Tkach's partner, R. Wayne McMillan individually). (*Cordier v. Tkach* (Aug. 22, 2006, B179095).) The stay was lifted following a status conference on October 30, 2006.

After a request to enter its default had been filed, SRG moved for relief from default and then answered and filed a cross-complaint against Cordier for abuse of process and declaratory relief. In its claim for declaratory relief SRG alleged Cordier's judgment had now been fully satisfied and thus the purported fraudulent conveyance of a

¹ Statutory references are to the Code of Civil Procedure.

security interest in the Pasadena condominium could not have damaged Cordier in any way.

Cordier filed a special motion to strike the cross-complaint pursuant to section 425.16 in September 2007. Opposition papers were filed and, after several continuances of the hearing, on December 14, 2007 the court granted the motion in part and denied it in part. The court found SRG's cause of action for abuse of process arose from Cordier's protected activity under section 425.16, subdivision (e), and SRG had failed to present any admissible evidence showing a probability of prevailing on the merits of the claim. The first cause of action was ordered stricken. The court found the declaratory relief cause of action did not arise from protected activity and therefore denied the motion to strike the second cause of action.

On September 4, 2008 SRG filed a motion for judgment on the pleadings directed to Cordier's complaint. SRG asserted, based on matters appearing in the complaint itself and those matters as to which the court could properly take judicial notice, that Cordier had failed to state facts sufficient to constitute a cause of action against SRG. Specifically, SRG argued the sole basis for setting aside the purported fraudulent conveyance was deficient because the judgment Cordier was seeking to enforce was satisfied in full in October 2006. SRG further explained in its moving papers the judgment in Los Angeles Superior Court case No. EC033305 had been bonded during the appeal and Cordier had been paid from that bond when the appeal had been resolved in his favor. In his opposition Cordier argued events occurring subsequent to the filing of a complaint are not properly considered in determining whether the complaint states a cause of action. Alternatively, Cordier requested leave to amend the complaint to state a tort cause of action against SRG.

On October 10, 2008 the court granted the motion for judgment on the pleadings for failure to state a claim, "[T]he Fifth Cause of Action seeks only remedies which are now unavailable due to the satisfaction of the judgment, a fact that is not in dispute and of which the court may take judicial notice." The court gave Cordier leave to file an

amended complaint. Cordier elected not to do so. On November 14, 2008 Cordier filed, and the clerk thereafter entered, Cordier's request for dismissal without prejudice of his complaint as to SRG only (Tkach remained a defendant in the lawsuit).

In the interim, on October 28, 2008 Cordier filed his own motion for judgment on the pleadings directed to SRG's cross-complaint, arguing the request for declaratory relief had been rendered moot as a result of the court's order granting judgment on the pleadings in favor of SRG on Cordier's cause of action for fraudulent conveyance. SRG opposed the motion, arguing the declaratory relief action was not moot until Cordier's claim had been dismissed;² Cordier filed a reply in support of the motion. On November 17, 2008, the date set for hearing Cordier's motion and for trial, the court ruled Cordier's motion off-calendar as moot. The court noted Cordier had dismissed SRG from his lawsuit; SRG's cross-complaint was then dismissed on SRG's own motion.

Several days later Cordier apparently submitted a proposed judgment (no copy is included in the clerk's transcript on appeal). SRG objected to Cordier's proposed judgment, arguing it was an effort to obtain costs in a case he had lost, and concurrently submitted its own proposed judgment and a memorandum of costs seeking an award of \$400 for filing and motion fees. Cordier thereafter submitted a memorandum of costs seeking recovery of \$1,110.65—\$480 in filing and motion fees and deposition costs of \$630.65 for the deposition of Carol Tkach, Tkach's former wife. Cordier's memorandum of costs also indicated attorney fees would be sought by motion.

The court filed a judgment on December 11, 2008, using the form of proposed judgment submitted by SRG. The court ordered entry of a judgment of dismissal in favor of SRG and against Cordier on his complaint. The judgment further provided SRG "shall recover costs pursuant to a Memorandum of Costs to be filed," and "Attorney's fees, if any[,] shall be awarded pursuant to a Notice of Motion."

² As the trial court observed when counsel appeared at the hearing on Cordier's motion, it was SRG's responsibility under section 438, subdivisions (h)(4)(C) and (i)(1)(B), to move for entry of judgment in its favor after Cordier failed to file an amended complaint within the 10 days allowed by the court.

Cordier filed a motion to tax costs, seeking to strike SRG’s memorandum of costs (for \$400) on the ground SRG was not properly considered the prevailing party under section 1032 in view of Cordier’s success on his special motion to strike the abuse of process claim in the cross-complaint. SRG filed its own motion to tax costs, seeking to strike Cordier’s memorandum of costs (for \$1,100.65), arguing it was the prevailing party in light of Cordier’s dismissal of the complaint against SRG on the eve of trial (and following the granting of its motion for judgment on the pleadings). On January 23, 2009 the court granted SRG’s motion to tax and denied Cordier’s motion, finding that SRG was the prevailing party for purpose of section 1032. The court explained, although Cordier had prevailed on the abuse of process claim through his special motion to strike,³ SRG prevailed as to the remaining two causes of action, “which were maintained for a year longer, during which time most of the costs were incurred.”

DISCUSSION

Code of Civil Procedure, section 1032, subdivision (a)(4), defines prevailing party for purposes of an award of litigation costs. “As used in this section, unless the context clearly requires otherwise: [¶] . . . [¶] (4) ‘Prevailing party’ includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the ‘prevailing party’ shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034.”

³ Cordier subsequently filed a motion pursuant to section 425.16, subdivision (c), to recover his attorney fees as the prevailing moving party on the special motion to strike. He sought a total of \$10,380 in fees. (His counsel submitted a declaration detailing 29.70 hours devoted to the motion with an agreed billing rate of \$375/hour.) The court awarded \$5,437.50 (14.5 hours at \$375/hour), noting that Cordier had been only partially successful in the motion. Cordier did not seek the recovery of any costs associated with the special motion to strike.

SRG successfully moved for a judgment on the pleadings on the only cause of action in Cordier's complaint in which it was named. Because SRG failed to move for entry of judgment under section 438, however, the complaint was ultimately dismissed by Cordier himself. Nonetheless, viewing the complaint alone, SRG was the prevailing party under section 1032, subdivision (a)(4), because it was "a defendant in whose favor a dismissal is entered."

With respect to SRG's cross-complaint, Cordier successfully moved to strike the abuse of process cause of action under section 425.16; and SRG's declaratory relief cause of action was ultimately dismissed as moot on SRG's own motion (following the dismissal of Cordier's claim to set aside a fraudulent conveyance). Thus, SRG literally took nothing by way of its cross-complaint.⁴ However, as the trial court impliedly found, SRG's request for declaratory relief could be viewed as successful, even though it was dismissed as moot, because SRG effectively obtained the relief it sought. (See *Howard v. Howard & Smith, Inc.* (1943) 58 Cal.App.2d 172 [plaintiff seeking inspection of corporate records entitled to costs as prevailing party even though action dismissed as moot after defendant corporation complied with plaintiff's demand].) Whether or not we agree, in light of SRG's undeniable victory on the complaint, the trial court had discretion to determine which, if either, party in this mixed-results case would be awarded statutory costs; and we review its decision for abuse of discretion. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332 ["[g]enerally, a trial court's determination that a litigant is a prevailing party, along with its award of fees and costs, is reviewed for abuse of discretion".])

There was no abuse of discretion. Cordier is correct his motion to strike SRG's abuse of process claim under section 425.16 produced the only merits-based ruling in the litigation. However, his partial success in challenging SRG's cross-complaint does not

⁴ Section 1032, subdivision (a)(1), (2) and (3), provides, for purpose of an award of costs, a complaint includes a cross-complaint, a plaintiff includes a cross-complainant and a defendant includes a cross-defendant.

require that the trial court find he was the prevailing party in the entire lawsuit, which involved both a complaint and a cross-complaint. Rather, as the party who brought a successful special motion to strike, Cordier was entitled to a “mandatory” award of attorney fees and costs under section 425.16, subdivision (c)(1). (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.)⁵ The fees and costs to which Cordier was entitled include those incurred for all proceedings directly related to the special motion to strike, including any discovery initiated by SRG pursuant to section 425.16, subdivision (g). (*Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 92-93; *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1248.) Cordier timely filed a motion under section 425.16, subdivision (c), and recovered a portion of the attorney fees he sought. For unexplained reasons he did not seek recovery of any costs in that motion (for example, the \$40 fee he paid to file the special motion to strike).⁶

As to the remaining litigation over the purported fraudulent conveyance from Tkach to SRG and the associated \$1,500 in costs as reflected in the memoranda of costs filed by Cordier and SRG—filing fees for pleadings and discovery motions, as well as expenses incurred in deposing one witnesses on matters apparently unrelated to Cordier’s special motion to strike the abuse of process claim—the trial court acted well within its

⁵ The dual purpose of this mandatory award is to discourage meritless lawsuits and to provide financial relief to the victim of a “SLAPP” action (strategic lawsuit against public participation) “by imposing the litigation costs on the party seeking to ‘chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.’” (*Ketchum v. Moses, supra*, 24 Cal.4th at p. 1131.) “The purpose of section 425.16 is clearly to give relief, including financial relief in the form of attorney’s fees and costs, to persons who have been victimized by meritless, retaliatory SLAPP lawsuits because of their ‘participation in matters of public significance.’” (*Liu v. Moore* (1999) 69 Cal.App.4th 745, 750; accord, *City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 628, fn. 19.)

⁶ Cordier’s notice of appeal includes the trial court’s March 13, 2009 order granting in part and denying in part his motion for attorney fees under section 425.16, subdivision (c). Cordier has abandoned his appeal from the order regarding attorney fees.

broad discretion to conclude SRG was the prevailing party. As demonstrated by the information set forth in SRG's motion for judgment on the pleadings, once Cordier's judgment in Los Angeles Superior Court case No. EC033305 was affirmed by this court in August 2006 and the judgment satisfied by the appellate bond that had been posted, there could be no viable claim to set aside any transfer from Tkach to SRG. The dismissal of Cordier's complaint against SRG and the concomitant dismissal of SRG's request for declaratory relief as moot were properly viewed by the trial court as a success for SRG.

DISPOSITION

The judgment and postjudgment order regarding costs are affirmed. Swanson Realty Group, Inc. is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.